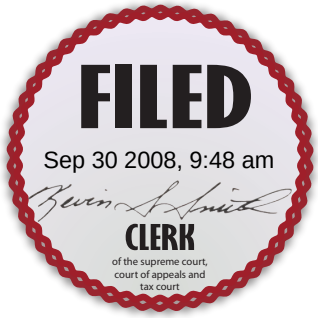

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IN THE
COURT OF APPEALS OF INDIANA

ANDRE POWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0802-CR-63
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0606-FD-58

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Andre Powell appeals his conviction for theft as a class D felony.[1] Powell raises two issues, which we revise and restate as:

I. Whether Powell knowingly, intelligently, and voluntarily waived his right to counsel; and

II. Whether the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of conversion as a class A misdemeanor.

We affirm.[2]

The relevant facts follow. On June 17, 2006, Paula Santiago went into her garage and "yelled that a black man was inside the car." Transcript at 175. Samuel Bahena, Paula's husband, went into the garage and saw Powell. Powell attempted to get on a bicycle and "get away." Id. at 176. Powell "lifted up his shirt like he was going to threaten" Samuel and told Samuel to "get back." Id. at 180. Samuel hit Powell, and Powell fell. Powell started running, and Samuel and his brother, Ismael Bahena, chased Powell. Powell was "zigzagging back and forth" behind houses. Id. at 178. Samuel called 911 on his cell phone while he was chasing Powell. After three or four minutes, Samuel and his brother eventually caught Powell and physically restrained him. Powell said, "Don't call the police," put his hands in his pockets, took some coins out, and said,

[1] Ind. Code § 35-43-4-2 (2004).

[2] We note that the record includes coins and a watch. See State's Exhibit 8. We remind the court reporter that Ind. Appellate Rule 29(B) provides: "Nondocumentary and oversized exhibits shall not be sent to the Court, but shall remain in the custody of the trial court or Administrative Agency during the appeal. Such exhibits shall be briefly identified in the Transcript where they were admitted into evidence. Photographs of any exhibit may be included in the volume of documentary exhibits."

"Here, take these and let's negotiate." Id. at 177. Powell told Samuel he would give him everything that he had taken. Police arrived and found Powell holding coins and Paula's watch.

The State charged Powell with receiving stolen property as a class D felony. The State later amended the information to theft as a class D felony.

On July 3, 2006, the trial court held an initial hearing and told Powell that the Public Defender's office was going to come and see him. On November 13, 2006, Powell appeared by a public defender. On April 30, 2007, Powell told the trial court that he "would like to proceed pro se." Id. at 12. The trial court questioned Powell regarding his decision to represent himself, and Powell confirmed that he desired to proceed pro se. On May 21, 2007, the trial court again questioned Powell regarding his decision to represent himself. On May 31, 2007, the trial court held another hearing and questioned Powell regarding his decision. Powell again confirmed his decision to proceed pro se. Powell expressed his desire to have a jury instruction of the lesser included offense of criminal conversion. The trial court told Powell to "write up a proposal" of a proposed jury instruction. Id. at 61. Powell did not tender a proposed jury instruction.

After the jury trial, the jury found Powell guilty of theft as a class D felony. The trial court sentenced Powell to three years in the Indiana Department of Correction.

I.

The first issue is whether Powell knowingly, intelligently, and voluntarily waived his right to counsel. The Sixth Amendment to the United States Constitution and Article 1, section 13 of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003) (citing Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). "Accordingly, when a criminal defendant waives his right to counsel and elects to proceed *pro se*, we must decide whether the trial court properly determined that the defendant's waiver was knowing, intelligent, and voluntary." Id. The waiver of assistance of counsel may be established based upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Id.

Powell argues that the trial court did not have a specific conversation with him "concerning a lawyer's skill and expertise." Appellant's Brief at 5. Powell also argues that he "should not have been permitted to proceed pro se without some inquiry into his competency and for the court to have so permitted was error." Id. Powell relies on Dowell v. State, 557 N.E.2d 1063 (Ind. Ct. App. 1990), trans. denied, cert. denied, 502 U.S. 861, 112 S. Ct. 181 (1991)). In Dowell, we held:

> The defendant should know of the nature of the charges against him, the possibility that there may be lesser included offenses within these charges, and the possibility of defenses and mitigating circumstances surrounding the charges. The defendant should be aware that self-representation is almost always unwise, that the defendant may conduct a defense which is to his own detriment, that the defendant will receive no special indulgence from the court and will have to abide by the same

> standards as an attorney as to the law and procedure, and that the State will be represented by experienced professional legal counsel.
>
> Specifically, the defendant should be instructed that an attorney has skills and expertise in preparing for and presenting a proper defense not possessed by the defendant. These include, among other things: (1) investigating and interrogating witnesses; (2) gathering appropriate documentary evidence; (3) obtaining favorable defense witnesses; (4) preparing and filing pre-trial motions; (5) preparing appropriate written instructions for the jury; (6) presenting favorable opening and closing statements; (7) examining and cross-examining witnesses at trial; and (8) recognizing objectionable, prejudicial evidence and testimony and making proper objections thereto.
>
> Finally, the trial court should inquire into the educational background of the defendant, the defendant's familiarity with legal procedures and rules of evidence, and additionally, into the defendant's mental capacity if there is any question as to the defendant's mental state. If the defendant chooses to proceed pro se, he should realize he cannot later claim inadequate representation.

Id. at 1066-1067. In Leonard v. State, 579 N.E.2d 1294, 1294 (Ind. 1991), the Indiana Supreme Court addressed the question of "whether the 'guidelines' set forth in [Dowell] to determine a knowing, intelligent, and voluntary waiver of a defendant's right to counsel are mandatory in making that determination." The Indiana Supreme Court held that the guidelines do not "constitute a rigid mandate setting forth specific inquiries that a trial court is required to make before determining whether a defendant's waiver of right to counsel is knowing, intelligent, and voluntary." Id. at 1296. The court held that it was sufficient that the trial court make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and

his choice is made with eyes open." Id. at 1295 (internal citation omitted). See also Jones, 783 N.E.2d at 1138 (citing Leonard for the holding that "it is sufficient for the lower court to acquaint the defendant with the advantages of attorney representation and the drawbacks of self-representation").

At the April 30, 2007 hearing, the following exchange occurred:

> THE COURT: And I want to make sure that you understand what you're asking the Court to consider doing. If I understand, you want me to vacate the appointment of the Public Defender's office in representing you in [this case]. Is that correct?
>
> MR. POWELL: That's right, Your Honor.
>
> THE COURT: Okay.
>
> MR. POWELL: That's right.
>
> THE COURT: Now if I do that, Mr. Powell, do you understand that you're going to be representing yourself?
>
> MR. POWELL: Yes, I do, Your Honor.
>
> THE COURT: And you're going to be held to the same standard as everyone else who practices in this courtroom, do you understand that?
>
> MR. POWELL: Yes, I do, Your Honor.
>
> THE COURT: Mr. Powell, I'm trying to say this without sounding overly straightforward. But from experience in sitting in the chair that Mr. Kinsman sits and sitting in the chair that Mr. Altenhof sits in, most people who represent themselves don't do very well. So I'm going to ask you again, because I think Mr. Kinsman makes a good suggestion. I don't mind giving you a new Public Defender and asking the Chief Public Defender to appoint a different attorney. I'll certainly entertain that request. But what I don't want to see you do, Mr. Powell, is dig yourself into a deeper hole by

representing yourself. The old adage that "a person who represents himself has a fool for a client" seems to play out very well in these types of cases. So Mr. Powell, I want you to think long and hard about what you're asking me to do. I will certainly entertain it because I do believe you have a right; but Mr. Powell, I think the better course of action for you, sir, is to at least sit down with another Public Defender and listen to him or her. Even though they may say things you don't like and even though they may suggest things to you you don't want to hear, that's their job. So with all that said, Mr. Powell, are you sure you want to go at this alone?

MR. POWELL: Ah, yes – yes, I am, Your Honor.

THE COURT: Okay.

MR. POWELL: Yes, I am.

* * * * *

THE COURT: Okay. Mr. Powell, I'm going to grant your request reluctantly – and you need to understand why I'm doing this reluctantly, Mr. Powell – to represent yourself in [this case]. I am not – I say again – not going to vacate the appearance of the Elkhart County Public Defender's office. I am going to vacate the appearance of attorney Kinsman representing you. But I am going to appoint the Elkhart County Public Defender's office to act as standby counsel on your behalf in the event you need an attorney. I'll leave that to the standby counsel who is appointed by the Chief Public Defendant [sic] to assist you, knowing that you, Mr. Powell, not your standby counsel, will end up trying this case. Mr. Powell, I'm doing my best to warn you as to the consequences of what you are requesting that the Court consider doing. I will certainly listen to a request to re-appoint in full the Public Defender's office to represent you as this thing continues forward. Mr. Powell, candidly, and as brutally honest as I can say, you are making a terrible mistake. Period. There are no exceptions to that rule. I have never once seen success from a pro se defendant who is not trained in this area. You are walking a very very fine tightrope, Mr. Powell. With that said, that'll be the ruling of the Court [in this case]. . . .

Transcript at 15-18. At the May 21, 2007 hearing, the following exchange occurred:

THE COURT: I know that Judge Roberts went through this with you before. You understand that as a pro se litigant, representing yourself in other words, that you have to follow all the rules. You have to follow the procedural rules, you have to follow the evidentiary rules, you're held to the same standard as an attorney who's licensed in good standing in the state of Indiana, and that's a tall order. That's a heavy burden for someone to do. Are you sure that's what you want to do here?

MR. POWELL: Ah, I'll deal with any objections as they come along, Your Honor. I know that's probably the main hurdle I have, you know. Knowing how to properly question and all that. And I'm – I'm going over that now. I'm starting to grasp some things as I go along here. So it's kinda [sic] like, you know learn as you go, you know, so….

THE COURT: The problem with learning as you go, Mr. Powell, is that in law school evidence is a semester-long class. And as a lawyer, a semester is a career-long learning process. The rules of evidence alone challenge most lawyers, even experienced lawyers. So you're undertaking a serious burden for yourself to try to do this. The average lawyer, if he or she got in trouble, the first thing they would do would be to hire another lawyer to represent them. They wouldn't try to represent themselves.

MR. POWELL: That – that's true.

THE COURT: You still want to do this?

MR. POWELL: I – I didn't have any choice, Your Honor.

THE COURT: Oh but you do have a choice. You – you have a choice because you have an absolute right to represent yourself, if you choose to do so, under Indiana law. And if you are indigent, and everybody agrees that you are, you have an absolute right to have an attorney appointed to represent you. So you do have a choice. And you have standby counsel who can provide some assistance to you, but that's not the same as their handling the case.

MR. POWELL: I was – I was wondering when my standby counsel was going to get in contact with me. I didn't – it's nothing I'm making a

big issue about but I would like to be in contact with standby counsel if – and have –

THE COURT: Very well. I'm sure they'll be contacting you shortly. They should be seeing you sometime this week.

Id. at 35-37. At the May 31, 2007 hearing, the following exchange occurred:

THE COURT: . . . . Before I go into some of the specifics on the jury trial, there's a couple of things I want to talk to you about. Mr. Powell, we – when you initially decided to proceed pro se on your own behalf, you and I had a little talk here in court. At that time, I recommended that you consider that and not go – not do that to yourself. Do you remember that conversation?

MR. POWELL: Yes, I do, Your Honor.

THE COURT: Okay. It's also my understanding that Judge Bowers, either last week or the week before, also addressed with you the idea of you representing yourself and the pitfalls and the potential problems associated with you representing yourself in a felony jury trial. Is that correct?

MR. POWELL: Yes, he did, Your Honor.

THE COURT: Okay. Now before we get to the specific issues, what I'm going to do, Mr. Powell – and I apologize for beating a dead horse – but I want to make certain that the record is clear that you understand the nature, the extent and the importance of having a lawyer represent you in a felony jury trial. So my first, question, Mr. Powell, is: Are you certain you still want to proceed without the benefit of an attorney representing you?

MR. POWELL: Yes, Your Honor.

THE COURT: Okay.

MR. POWELL: I have to – yes, Your Honor, I have to proceed on.

THE COURT: I'm sorry?

MR. POWELL: Yes, Your Honor. I have to proceed on.

THE COURT: Okay. And you understand the potential problems and pitfalls and dangers and disadvantages of proceeding without the benefit of an attorney?

MR. POWELL: Ah, for the most part I do, Your Honor.

THE COURT: Okay. Well, let's talk for just a moment about the part that you don't understand. What part of that is it that you're having some concerns with, Mr. Powell?

MR. POWELL: Ah, other than just – other than the experience – there are some things that I – that of course that I can't – that I possibly can't know as a lawyer. But the things that are relevant to the case, I believe I can cover those things, Your Honor.

THE COURT: Okay. And it seems to me, Mr. Powell, that you've given this a great deal of consideration, would that be fair?

MR. POWELL: Yes, Your Honor.

THE COURT: You've thought about this and I know you've been reading and filing some motions with the Court. So again, this is not something you've just simply decided to do.

MR. POWELL: No, Your Honor, it's not.

THE COURT: Okay. Mr. Powell, I think from the last time you and I spoke in open court, I had indicated to you that I have really never seen a pro se defendant successfully defend himself in a criminal prosecution at the felony level. It didn't seem to sway you, though. Would that be accurate?

MR. POWELL: Ah, I'd be dishonest if I didn't say I didn't think about it, but it didn't sway me, no, Your Honor.

THE COURT: Okay. Mr. Powell, I stand firm on my suggestion to you that I think you're making a large mistake, in fact a terrible mistake,

proceeding without representation at a felony jury trial. Do you understand that?

MR. POWELL: Yes, your Honor.

THE COURT: Do you understand that from my experience of sitting in the position at those counsel tables, that you'll probably do a pretty good job at first; but as things get a little bit farther into the case and things get a little stickier, things may not go well for you. Do you understand that?

MR. POWELL: That's – I understand it, yes, Your Honor. I understand that is possible, yes.

THE COURT: Okay. You also understand, Mr. Powell, that once we get started, I'm going to be reluctant to permit you to switch gears at that point.

* * * * *

THE COURT: Okay, let me say it differently. I'm going to be reluctant, Mr. Powell, if half-way through this trial you think that you're in way over your head – which I suspect you will be, but I may be wrong – I'm going to be very very reluctant letting you switch gears and ask [your standby counsel] to take over the defense of your case. You understand that?

MR. POWELL: Yes. Yes, Your Honor.

THE COURT: It seems to me, Mr. Powell – and again, I am doing my best to make sure that the record is crystal clear – that you're asking the Court to allow you to proceed without the benefit of an attorney.

MR. POWELL: Yes, Your Honor.

THE COURT: Mr. Powell, are you certain you want to do this?

MR. POWELL: Yes. Yes, I am.

THE COURT: Okay.

> MR. POWELL: I made – I have to be firm. I made that decision a month ago today. So I have to be firm with it, Your Honor.
>
> THE COURT: Okay, the Court finds that the defendant has intelligently and competently waived his right to counsel. . . .

Id. at 41-44.

The record is sufficient to establish that the trial court informed Powell of the advantages of representation by counsel and the disadvantages of self representation and that Powell intelligently chose to represent himself. See, e.g., Jones, 783 N.E.2d at 1139 (holding that the defendant knowingly, intelligently, and voluntarily waived his right to counsel where the trial court explicitly informed the defendant of the potential danger of pro se litigation, reminded the defendant that he was not trained in the law and that his attorneys were, cautioned the defendant that he would be held to the same standard as a lawyer, warned him that if he were convicted he would not be able to claim ineffective assistance on appeal, asked him more than three times whether he wanted to represent himself, and attempted to discourage the defendant from self-representation); Leonard, 579 N.E.2d at 1297 (holding that the defendant voluntarily, intelligently, and knowingly chose to exercise his constitutional right to self-representation).

II.

The next issue is whether the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of conversion as a class A misdemeanor.

When the asserted error is failure to give an instruction, as Powell now argues, a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request. Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). Failure to tender an instruction results in waiver of the issue for review. Id. Powell concedes that he did not "formally" tender an instruction on conversion as a class A misdemeanor. Appellant's Brief at 1. Thus, Powell has waived this issue. See Ortiz, 766 N.E.2d at 375 (holding that the failure to tender an instruction results in waiver of the issue for review).

For the foregoing reasons, we affirm Powell's conviction for theft as a class D felony.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur